No. 95-970

(2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ROBERT A. MERCER, JR.,

Petitioner,

vs.

JASON MONZACK, ESQ.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the proceeds from the Petitioner's personal injury action, which was part of the bankruptcy estate, become exempt by virtue of the manner in which the Petitioner listed his exemptions under Schedule B-4?

2. Whether or not the Bankruptcy Court had the authority, pursuant to Bankruptcy Code, 11 U.S.C. § 105(a) to disallow Petitioner's claimed exemptions as not being claimed in good faith.

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STATEMENT OF THE CASE

Claiming that a split of authority exists between the First and Seventh Circuits, Petitioner, Robert Mercer, has asked that this Court review and correct a decision of the United States Court of Appeals for the First Circuit affirming a decision of the United States District Court for the District of Rhode Island. Relying primarily on this Courts decision, *Taylor v. Freeland & Kronz*, __ U.S. __, 112 S. Ct. 1644 (1992), Petitioner asserts that the First Circuit Court of Appeals erred in affirming the decision of the United States District Court for the District of Rhode Island, which in turn was affirming the United States Bankruptcy Court for the District of Rhode Island's decision ordering the Petitioner to turn over a portion of the proceeds of his personal injury settlement to the Respondent, Trustee Jason Monzack. The Petitioner claims that the manner in which he listed his exemptions under Schedule B-4 clearly and unmistakably put the Trustee on notice that he was claiming the entire proceeds from the personal injury settlement, $50,000, as exempt; and by virtue of the Trustee's failure to object, that those proceeds are now exempt as a matter of law. Respondent, Jason Monzack, Esq., on the other hand, contends that the Court of Appeals correctly held that the debtor did not properly list the entire personal injury proceeds so as to invoke the privileges that he would otherwise enjoy by the virtue of the Trustee's failure to file a Rule 4003 objection.

The Petitioner sustained personal injuries in an automobile accident on January 19, 1990, and as a result, he initiated a claim against the alleged tortfeasor. On June 19, 1991, Petitioner and his wife filed a joint Chapter 7 Petition, and by operation of law, the pending negligence claim became an asset of the bankruptcy estate. In the original schedules filed by the Petitioner, the personal injury claim was listed as an asset with a market value of $15,000. Claiming federal exemptions, the Petitioner listed a

"possible Personal Injury Settlement Injury & Wrongfully [sic] Death Recov." as exempt, in the amount of $7,500, pursuant to 11 U.S.C. § 522(d)(11)D. On August 2, 1991, the Petitioner amended Schedule B-3 by increasing the potential value of the settlement to $40,000. The Petitioner also amended Schedule B-4 as follows:

"Type of Property Location, Description	Statute	Exempt Amount
Any property not yet scheduled Possible personal injury settlement Disability	11 USC 522(d)(10)C	100%
Payment on account of personal bodily injury	11 USC 522(d)(11)D	7,500
Payment in compensation for loss of future earnings	11 USC 522(d)(11)E	100%
Any property selected by debtor	11 USC 522(d)(5)	3,750
Possible Consortium Claim		SPOUSE
Payment on acct of bodily injury	11 USC 522(d)(11)D	7,500
Any property selected by debtor"	11 USC 522(d)(5)	3,750

The Trustee, Respondent, was advised by debtor's attorney that an offer of settlement in the amount of $50,000 had been made to Robert Mercer, Jr. on his personal injury claim. On March 2, 1992, the Trustee then filed a Motion for Turnover and for Determination of the Bankruptcy Estate's Interest in the Settlement Proceeds of Debtor's Personal Injury Claim. On March 13, 1992, debtor filed a motion for extension of time to answer. The Trustee moved for production of documents from the Petitioner. On April 9, 1992, debtor filed an objection to Motion for Turnover and Answer. On April 14, 1992, Trustee filed his Motion to Compel Production of Documents, which was granted on May 4, 1992 over the Petitioner's objection of April 24, 1992. On May 8, 1992, the Trustee filed his Motion for Sanctions pursuant to Bankruptcy Rule 7037. On May 11, 1992, debtor submitted his compliance with Trustee's motion to compel production of documents. On May 20, 1992, the debtor filed his second Objection to Trustee's Motion to Compel Production of Documents and his Objection to Trustee's Motion for Sanctions, Pursuant to Bankruptcy Rule 7037. On May 22, 1992, the Bankruptcy Court dismissed the debtor's Objection to Motion for Turnover and granted the Trustee's Motion to Turnover and for Sanctions, ordering the Petitioner to turn over the total proceeds of the personal injury settlement, to wit, $50,000.

Your Petitioner appealed the granting of the Trustee's motion on May 26, 1992. The District Court of the United States for the District of Rhode Island, on September 15, 1992, remanded the matter back to the Bankruptcy Court for a statement of reasons, findings of fact, legal authority for the Bankruptcy Court's order of May 26, 1992 in summarily granting the Trustee's motion, that the debtor's counsel immediately turn over to the Trustee the $50,000 settlement proceeds.

On May 20, 1993, the matter was heard before Judge Votolato in response to the United States District Court's Order of Remand. Petitioner was unable to present evidence at the hearing to establish that any portion of the settlement proceeds were compensation for disability or loss of future earnings. *In re Mercer,* 158 B.R. at 889. Consequently, the judge found as a fact that the total settlement compensation on account of personal bodily injury. *Id.*

Judge Votolato in applying the standard set forth by this Court in *Taylor,* found that the Trustee had not made the same mistake as Taylor. Judge Votolato ruled that the debtor's listed exemptions were exactly what 11 U.S.C. § 522(d) allowed and that had the Trustee filed an objection, it probably would have been without merit, and perhaps even constituted a frivolous pleading subject to Rule 9011 sanctions. *Id.* at 888. On September 16, 1993, the United States Bankruptcy Court for the District of Rhode Island's order entered awarding the Petitioner $11,250 of the settlement proceeds as exempt property and the remaining balance of $38,750 was awarded as property of the estate. *Id.* at 889.

Petitioner timely took his appeal from the final order of Judge Votaloto, consolidating that appeal with his June 4, 1992 appeal.

In *Mercer v. Monzack,* 170 B.R. 759 (D.R.I. 1994) the United States District Court of Rhode Island affirmed the Bankruptcy Court decision. The court distinguished *Taylor* from the case before it. In Taylor, listing the value of the claim as unknown and claiming the full amount as exempt was "tantamount to waiving a red flag in the Trustee's face, as if to say, 'it may be worth more than the law allows, but I'm claiming it anyway'." *Id.* at 262, citing *In re: Schumacher,* 155 B.R. at 555 (Bankr. N.D. Ala. 1992). However, Mercer did not raise a "red

flag" in front of Monzack. Monzack did not object because Mercer *claimed exactly what he was entitled to under the law (and what he actually will receive). Id.*

The First Circuit Court of Appeals in *Mercer v. Monzack*, 53 F. 3d 1 (lst Cir. 1995) affirmed the United States District Court's Order. In so ruling, the First Circuit Court of Appeals saw the threshold question being whether the property in dispute is, *"in fact, the property of the estate listed as exempt." Id.* at 3. The First Circuit Court of Appeals noted that the Petitioner was arguing that when he listed, by example, disability "100%" he intended to exempt the entire settlement fund. The court stated:

> True, *Taylor* requires that we interpret and apply section 522(1) and Bankruptcy Rule 4003(b) according to their literal intendment. But section 522(1) neither states nor implies that property of the estate *becomes property of the kind* the debtor describes on Schedule B-4. Rather, as the Court recognized in *Taylor,* 112 S. Ct. at 1646, absent a timely Rule 4003(b) objection, property of the estate plainly listed on Schedule B-4 *becomes exempt* by operation of law under section 522(1) *without regard to whether it is property of the kind entitled to exemption* under section 522(d).

Id.

Notwithstanding the Petitioner's argument as stated above, the court noted that Petitioner's amended Schedule B-4 plainly listed discrete statutory citations supporting the various exemption claims, thereby restricting both the focus of the exemptions claimed and the description of the particular right or

interest in property of the estate to which the claims applied. *Id.* In so ruling, the First Circuit Court of Appeals held that the Bankruptcy Court for the District of Rhode Island maintained exclusive summary jurisdiction and it remained for the Bankruptcy Court to determine whether the disputed right or interest in property of the estate was listed on Schedule B-4.

The First Circuit Court of Appeals affirmed the District Court's decision on the ground that the property of the estate at issue on appeal was neither listed as exempt on Schedule B-4, nor became exempt by operation of law under Bankruptcy Code 522(1). It should also be noted that the First Circuit Court of Appeals stated in a footnote that it may have been able to affirm the District Court's decision, under Bankruptcy Code 105(a), 11 U.S.C. § 105(a), as being exemptions not claimed in good faith, which was briefed by the Respondent.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO SPLIT OF AUTHORITY BETWEEN THE CIRCUITS OR BETWEEN THE STATE TO WARRANT THE ISSUANCE OF A WRIT OF CERTIORARI.

Petitioner maintains that there is a conflict between the decisions issued by the Court of Appeals for the First Circuit in *Mercer v. Monzack*, 53 F.3d 1, and that of the Seventh Circuit in *Matter of Salzar*, 52 F.3d 708 (7th Cir. 1995) in which it affirmed the decision in The *Matter of Kazi*, 98 F.2d 318 (7th Cir. 1993). There are no real conflicts between the decision of the First and Seventh Circuit Courts of Appeals.

A. There Is No Meaningful Split of Authority Between the Circuit Courts of Appeals.

The Seventh Circuit in *Kazi* was faced with a situation where the debtor, in his original petition and schedule, claimed pension trust funds and IRA's as exempt "if said property is property of the estate." *Kazi, supra* at 322. The debtor was telling the trustee, in essence, "I think that the trust funds and IRA's are not property of the estate, but if they are, I am claiming the entire amounts as exempt." With that, the proverbial "red flag" was raised. The Trustee failed to file an objection within the thirty days as prescribed by Rule 4003(b). The Seventh Circuit held that the Trustee could not object beyond the thirty day period applying *Taylor.*

The Seventh Circuit's decision in *Kazi* is consistent with this Court's ruling in *Taylor* — when the debtor claims an exemption, which puts the Trustee on notice that he is claiming more than he is entitled to, the Trustee will be strictly held to the thirty day requirement and on the thirty-first day, the debtor will be granted an exemption for the full amount claimed.

The First Circuit Court of Appeals in *Mercer v. Monzack,* 53 F.3d 1 (1st Cir. 1995) had a quite different factual situation. In *Mercer* the debtor in his Petition and schedules raised no "red flags." The debtor claimed his exemptions specifically and literally as provided under 11 U.S.C. § 522. The Trustee did not object because the debtor was entitled to exactly what he claimed — 100% of whatever portion of the personal injury settlement was disability compensation, $7,500 of whatever portion was determined to be payment on account of personal bodily injury, 100% of any portion which was determined payment and compensation for loss of future earnings, and $3,750 for any portion of any property selected by the debtor. The Trustee admits that the debtor/Petitioner is entitled to exactly what he claimed as exempt. The Trustee has never asked the court to take

away any of the Petitioner's claimed exemptions. Rather, once the offer of settlement was presented to the court, through the Trustee's request to compromise the debtor's personal injury claim, the Trustee requested a hearing to determine what, if any, excess existed beyond the debtor's claimed exemptions. The excess would remain as property of the estate. After the hearing, the Bankruptcy Court found as a fact, *that no portion of the personal injury settlement was on payment for disability or out of payment and compensation for loss of future earnings. In re Mercer,* 158 B.R. at 889. This is a factual determination which the debtor has never raised on any level of appeal. *See Mercer v. Monzack,* 170 B.R. 759, 762 n. 16 (D.R.I. 1994); *Mercer v. Monzack,* 53 F.3d 1, 3 (1st Cir. 1995). The First Circuit Court of Appeals held that the case before it did not trigger the mandates of *Taylor.* The court reasoned that the Petitioner's personal injury claim by viture of his filing the voluntary Chapter 7 Petition became an asset of the estate and the only exception was to claim it as an exemption. Specifically, the court stated:

> That is, absent inclusion on a list of property that the debtor claims as exempt, *"property of the estate" is not exempted by operation of law under section 522(1), regardless whether a Rule 4003(b) objection was filed.*

Mercer v. Monzack, 53 F.3d 1 at 3.

The logical reasoning applied by the First Circuit Court of Appeals was as follows: It espoused the rule emanating from *Taylor* to be "absent a timely Rule 4003(b) objection, property of the estate plainly listed on Schedule B-4 *becomes exempt* by operation of law under section 533(1) *without regard to whether it is property of the kind entitled to exemption* under section 522(d)." *Id.*

Petitioner was attempting to argue that it was his intention to claim the entire proceeds of the settlement as exempt when he listed his exemptions as they appeared on Schedule B-4. The court noted that the Petitioner's Schedule B-4 plainly listed discrete statutory citations supporting the various exemption claims, *thereby restricting both the focus of the exemptions and the description of the particular right or interest in property of the estate to which the claims applied.*" *Id.* (Emphasis added). The court then reasoned, with the foregoing predicate, that the Bankruptcy Court "pursuant to its exclusive summary jurisdiction, *See, e.g., In re Stumpff,* 109 B.R. 1014, 1017 (Bankr. E.D. Okla.), it remained for the Bankruptcy Court to determine whether the disputed right or interest in property of the estate was listed on Schedule B-4." *Id.* The court recognized that the Trustee was not seeking to set aside any of the Petitioner's exemptions, contrary to the trustee's efforts in *Taylor.* If, in fact, the Bankruptcy Court determined that the personal injury settlement was, in fact, 100% compensation in disability, *Taylor* would apply and this matter would not be before you today.

There is no meaningful conflict between the decisions of the First and Seventh Circuits of sufficient importance to warrant this Court's review.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT CORRECTLY APPLIED *TAYLOR.*

This Court in *Taylor* saw the issue as:

> *We must decide in this case whether the* trustee may contest *the validity of an exemption after the thirty day period* if the

> debtor had no colorable basis for claiming the exemption.

Taylor, 112 S. Ct. 1646.

In the case that is now before the Court, Trustee is not contesting the validity of the exemptions claimed by the debtor. In *Taylor,* the debtor was claiming the entire proceeds from her lawsuit as exempt. In fact, the debtor and Trustee had several discussions pertaining to the value of the debtor's claim. The Trustee's continued belief that the claim was not worth what the debtor was asserting. The Trustee had never filed an objection to the claimed exemption. Once the case was settled and the debtor was awarded $110,000, the Trustee was seeking to object to the debtor's claim of an exemption for the entire proceeds. The Trustee in *Taylor* was put on notice that debtor was claiming more than she was entitled to and was trying to strike her claim of an exemption.

In stark contrast, the First Circuit correctly held that the Trustee was not put on notice that the debtor was claiming more than he was entitled and the Trustee was not seeking to strike any of the objections listed by the Petitioner. The Trustee was simply seeking to determine what, if any, proceeds exist in excess of the claimed exeemptions by the debtor, which proceeds would then remain property of the estate. *See In re Bronner* 135 B.R. 645 (9th Cir. BAP 1992). The First Circuit Court of Appeals correctly held that Monzack had not violated the requirements of *Taylor.*

III.

THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF RHODE ISLAND HAD THE AUTHORITY AND JURISDICTION IN SUPPORT OF ITS DECISION PURSUANT TO BANKRUPTCY CODE 105(a), 11 U.S.C. § 105(a).

This Court in *Taylor* left unanswered as to whether or not Bankruptcy Code 11 U.S.C. § 105(a) could provide the basis to affirm the Bankruptcy Court's decision. That provision states:

> The Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. *No provision of this title providing for the raising of an issue by a party and interest shall be construed to preclude the court from, sua sponte, taking any action* or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse or process.

11 U.S.C. § 105(a) (emphasis added). 11 U.S.C. § 105(a) permits courts to disallow exemptions not claimed in good faith. *See, e.g., Raggsdale v. Genesco, Inc.* 674 F.2d 277, 278 (4th Cir. 1982); *In Re: Staniforth*, 116 B.R. 127, 131 (W.D.W.B. 1990); *In Re: Budinsky*, 90 01099, 1991 WL 105640 (W.D. Pa. 6/10/91).

It is clear from the manner in which the debtors amended their bankruptcy schedules that the debtors did not claim their exemptions in good faith. The debtors repeatedly characterized the subject asset as a "Personal Injury Settlement." Yet they also repeatedly state that they may claim it as exempt in its entirety as a right to receive a disability benefit. This demonstrates an intent

to mislead and a lack of good faith by the debtors. This lack of good faith is repeatedly shown by the debtor's continuing insistence that because he calls the personal injury settlement a disability payment, then the Bankruptcy Court does not have the ability to consider any issues relating to the personal injury settlement with no evidence to support his allegation. When the United States District Court for the District of Rhode Island remanded the matter back to the Bankruptcy Court, Judge Votolato held a hearing to determine which portion of the $50,000 settlement was in fact related to a disability payment and/or loss of future earnings. The debtor provided no proof to the Bankruptcy Court that in fact any disability was causally related to his injury and consequently could not show that any of the proceeds represented compensation for disability or loss of future earnings. This provides an additional basis to affirm the First Circuit Court of Appeals' decision and to deny the Petition that is before you.

CONCLUSION

For all the foregoing reasons, Respondent Jason Monzack respectfully urges that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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